No. 22-0427

In the Supreme Court of Texas

TEXAS DEPARTMENT OF INSURANCE AND CASSIE BROWN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE,

Petitioners,

v.

STONEWATER ROOFING, LTD. CO.,

Respondent.

On Petition for Review
from the Seventh Court of Appeals, Amarillo

PETITION FOR REVIEW

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Statement of the Case

Nature of the Case:	Stonewater Roofing, Ltd. Co. ("Stonewater") sued the Texas Department of Insurance and its Commissioner (collectively, "TDI") to invalidate two provisions of the Texas Insurance Code on grounds that the statutes violate the First and Fourteenth Amendments to the United States Constitution. CR.3-15. TDI filed a motion to dismiss under Texas Rule of Civil Procedure 91a. CR.53-64.
Trial Court:	201st Judicial District Court, Travis County The Honorable Lora J. Livingston
Disposition in the Trial Court:	After a hearing, CR.66; RR.1-51, the trial court granted TDI's Rule 91a motion, CR.107.
Parties in the Court of Appeals:	Stonewater was the appellant. TDI and its Commissioner were the appellees.
Disposition in the Court of Appeals:	The court of appeals reversed the trial court's judgment and remanded the case for further proceedings. *Stonewater Roofing, Ltd. v. TDI*, 641 S.W.3d 794 (Tex. App.—Amarillo 2022, pet. filed) (per Pirtle, J., joined by Quinn, C.J., and Doss, J.). TDI filed a motion for rehearing, which was denied. *Stonewater Roofing, Ltd. v. TDI*, No. 07-21-00016-CV (Tex. App—Amarillo Apr. 21, 2022).

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a) because this petition presents questions of law that are important to Texas jurisprudence regarding the Legislature's authority to regulate professionals across the State notwithstanding any incidental burden such regulations impose upon speech.

Issues Presented

Section 4102.051(a) of the Texas Insurance Code restricts a person from engaging in the practice of public insurance adjusting without a license. Section 4102.163(a) further restricts a contractor from acting as a public insurance adjuster for any property for which the contractor is providing (or may provide) contracting services, irrespective of whether the contractor maintains a license.

The issues presented are:

(1) Whether sections 4102.051(a) and 4102.163(a) are content-based restrictions on speech that implicate the First Amendment; and

(2) Whether Stonewater may assert a void-for-vagueness challenge against those provisions, even though they clearly prohibit Stonewater's own conduct.

To the Honorable Supreme Court of Texas:

> [T]he States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)); *accord Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

Stonewater seeks to continue engaging in the unlicensed practice of public insurance adjusting based upon a supposed violation of its First Amendment rights. But the challenged laws do not implicate First Amendment standards because they regulate professional conduct, not speech as speech. Moreover, the opinion of the court of appeals, by misapplying some precedents and disregarding others, has implications that go beyond the parties in this case. The court's opinion may be viewed by litigants in future cases as precedent or persuasive authority for undoing numerous regulatory schemes governing professions and professionals that benefit public health and safety, economic interests, and the proper functioning of society.

Because this case presents important issues of both federal constitutional law and state regulatory law, and because the lower court's opinion could have sweeping negative effects if followed in other cases, the Court should grant review, reverse the court of appeals' judgment, and reinstate the trial court's judgment dismissing Stonewater's suit under Texas Rule of Civil Procedure 91a.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* p.v

I. Legal and Factual Background

A. Texas regulates public insurance adjusting as a profession.

In 2003, the Legislature enacted a comprehensive regulatory scheme governing the profession of public insurance adjusting that was subsequently codified in chapter 4102 of the Texas Insurance Code. Act of June 1, 2003, 78th Leg., R.S., ch. 207, § 3.02, art. 21.07-5, 2003 Tex. Gen. Laws 962, 964, *repealed by* Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 11.082(b), 2005 Tex. Gen. Laws 2188, 2272 (codified at Tex. Ins. Code §§ 4102.001-.208).

Central to this regulatory scheme is a licensing requirement: "[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license." Tex. Ins. Code § 4102.051(a). The law defines "public insurance adjuster" as:

> (A) a person who, for direct, indirect, or any other compensation:
>
> > (i) acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
> >
> > (ii) on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
>
> (B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.

Id. § 4102.001(3). The term "'[p]erson' includes an individual, firm, company, association, organization, partnership, limited liability company, or corporation." *Id.* § 4102.001(2).

In addition to its license requirement and provisions governing how one may be obtained, *id.* §§ 4102.051-.068, chapter 4102 imposes various regulations on public insurance adjusters, *id.* §§ 4102.101-.164. Among these are prohibitions on certain conflicts of interest. Specifically, a license holder may not "participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder." *Id.* § 4102.158(a)(1). Similarly, "[a] contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services." *Id.* § 4102.163(a). The prohibition applicable to contractors applies "regardless of whether the contractor" "holds a license." *Id.*

B. Stonewater seeks to continue engaging in the unlicensed practice of public insurance adjusting.

Stonewater is a roofing company that provides its services to commercial and residential customers in Texas. CR.5. Stonewater alleges that, in performing "[r]oofing transactions," its customers often have insurance covering the costs of repairing damage to their roofs, and "[t]he [insurance company] communicates with both the customer [the insured] and the roofing company [Stonewater] to evaluate and ultimately settle the customer's insurance claim by distributing monetary proceeds that the customer may then use to pay the roofing company for its work." CR.5. As part

of this three-way interaction, Stonewater contends that it "regularly communicates directly with the customer's insurer to identify and explain the relevant damage, inquire about claim status, revision, and supplementation, and answer any questions from the insurer regarding, among other things, the scope of the necessary work, the estimated costs, and the recommended methods of repair." CR.5-6. So, in Stonewater's view, its roofing business necessarily (or at least regularly) is engaged in public insurance adjusting because it "acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property." Tex. Ins. Code § 4102.001(3)(A)(i).

Stonewater's website and service contracts also contain language confirming that Stonewater engages in public insurance adjusting activities. On its website, Stonewater describes itself as "highly experienced with the insurance claims process," having "done thousands of roof restorations due to insurance claims over the years." CR.6. The website further self-proclaims Stonewater as an "Insurance Specialist[]" and "The Leader In Insurance Claim Approval" that has "developed a system which helps [its] customers settle their insurance claims as quickly, painlessly and comprehensively as possible." CR.6. Stonewater's contracts with customers also authorize it "to negotiate on [the customer's] behalf with [the] insurance company and upon insurance approval to do the work specified." CR.7 (alterations in original). In other words, Stonewater holds itself out to be a public insurance adjuster because it advertises to provide services defined in Texas as public insurance adjusting and its contracts purport to authorize it to perform public insurance adjusting

services for its customers. Stonewater makes these representations even though it admittedly holds no license as a public insurance adjuster. *Stonewater*, 641 S.W.3d at 798.

In sum, Stonewater thinks it is entitled to practice public insurance adjusting as part of its roofing business despite not holding the license required by law. *See* CR.5-7, 16.

II. Procedural History

Stonewater sued TDI contending that sections 4102.051(a) (the licensing requirement) and 4102.163 (the conflict-of-interest prohibition) are (1) void as impermissible restrictions on commercial speech under the First Amendment and (2) void for vagueness under the Fourteenth Amendment. CR.14-15.[2] Stonewater attempted to state both facial and as-applied challenges under each of its theories. CR.14-15. It sought a judgment declaring those sections unconstitutional and granting Stonewater its reasonable and necessary attorneys' fees and costs. CR.16.

TDI moved for dismissal under Texas Rule of Civil Procedure 91a, arguing that Stonewater had stated a claim without any legal basis. CR.53-65. After further

[2] The Texas Constitution guarantees the same rights as the First and Fourteenth Amendments to the U.S. Constitution. *See* Tex. Const. art. I, §§ 8, 19. Because Stonewater asked only for a declaratory judgment that the statutes violate the U.S. Constitution, CR.16, however, TDI addresses only the First and Fourteenth Amendments with the understanding that the analysis for the Texas Constitution is incorporated to the extent relevant.

briefing, CR.69-94, 95-104, and a hearing, RR.4-50, the trial court granted the motion, CR.107. Stonewater appealed. *See* CR.111-12, 122.

The court of appeals reversed the trial court's judgment and remanded the case for further proceedings. *Stonewater*, 641 S.W.3d at 805. The court held that the challenged provisions implicate First Amendment scrutiny, rejecting TDI's argument that the provisions regulate conduct rather than speech as speech. *Id.* at 800-03. The court further held that TDI had not sufficiently developed its argument against Stonewater's "facial vagueness" challenge in the trial court, *id.* at 804-05, and that "Stonewater's statements were not clearly proscribed," *id.* at 805. Thus, the court of appeals concluded that Stonewater had pleaded claims that survive TDI's Rule 91a motion.

Summary of the Argument

Just because a profession involves speaking to the public writ large does not mean that the profession is immune from all regulation directed at professional conduct that may also incidentally involve speech occurring as part of that conduct. After all, many professions involve speaking to clients, counterparties, patients, fellow practitioners, and practitioners of other professions. Indeed, such speech is a core element of professions such as the practice of law, the practice of medicine, and public insurance adjusting. When the State regulates those professions, including by regulating who may practice them or by establishing conflict-of-interest rules governing practitioners, it regulates conduct—not speech.

It has never been the case that a law prohibiting, for example, an unlicensed person from giving legal advice is subject to any First Amendment scrutiny. Such a regulation, like the licensing and conflict-of-interest regulations at issue in this case, restricts conduct—i.e., who may practice the profession and under what conditions they may do so. The incidental burden upon speech that comes from that restriction does not support a First Amendment challenge. If, as the court of appeals concluded, such laws do regulate speech as speech, schemes that require licenses for attorneys and punish the unlicensed provision of legal advice would be in jeopardy, as would similar regulations for numerous other professions.

Furthermore, a vagueness challenge, whether facial or as applied, and whether sounding in fair notice or in arbitrary enforcement, is barred if at least some of the plaintiff's conduct is clearly proscribed. The court of appeals was wrong to conclude that TDI forfeited any of its vagueness arguments and, because at least some of Stonewater's conduct is clearly proscribed, wrong to conclude that any of Stonewater's vagueness claims could proceed.

ARGUMENT

I. Stonewater's Free-Speech Challenge Is Meritless.

It is beyond cavil that the State may regulate professions and professionals, including public insurance adjusters. *See Dent*, 129 U.S. at 122; *Gade*, 505 U.S. at 108. That authority extends to both professional licensure requirements and the establishment of standards for the conduct of the profession. *Dent*, 129 U.S. at 122; *Gade*, 505 U.S. at 108. The statutes here do not regulate speech as speech, as did the statute

in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) ("*NIFLA*"). Rather, they regulate conduct—the conduct of a regulated profession. Although these conduct regulations incidentally burden speech, they do not implicate the First Amendment under long-established precedent.

Nevertheless, Stonewater, primarily relying on an overbroad reading of *NIFLA*, argues that the State's regulatory scheme governing the profession of public insurance adjusting violates the First Amendment's speech clause. Also misapplying *NIFLA*, the court of appeals agreed and, in the process, laid groundwork for the undoing of the State's power to regulate professions and professionals.

Two provisions, among many that apply to public insurance adjusters, are at issue. The first, section 4102.051(a), provides that a person may not act as or hold himself out to be a public insurance adjuster, as defined by section 4102.001(3), unless he is licensed. And the second, section 4102.163, is a conflict-of-interest rule applicable specifically to contractors, which supplements the general conflict-of-interest rule, section 4102.158. Neither of these regulations limits speech as speech. Because these statutes burden speech only incidentally—if at all—they do not offend the First Amendment.[3]

[3] The arguments TDI makes here are equally applicable to both Stonewater's facial and as-applied challenges. Stonewater's argument in the court of appeals that TDI failed to move to dismiss its as-applied challenge is incorrect. CR.57-61.

A. The statutes at issue burden speech only incidentally and do not implicate the First Amendment.

"[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). That black-letter principle applies with equal force to the commerce and conduct of professionals. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Thus, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

This case is controlled by a couple of well-established precepts. First, there is the speech-versus-conduct dichotomy and the corollary rule that the State may regulate conduct even if that regulation burdens speech. Second, there is the rule that the State may require licenses for professionals and regulate their conduct. Although the practice of the profession of public insurance adjusting involves speaking to customers, insurance companies, contractors, engineers, and other parties, a restriction on who may practice that profession and a conflict-of-interest prohibition are no more than conduct limitations that incidentally burden speech associated with the conduct.

The first statute at issue here, the license requirement, says that a person may not practice public insurance adjusting without a license. Tex. Ins. Code § 4102.051(a). It directly restricts no speech; it governs who may engage in certain defined professional conduct. The same goes for the second provision, which

requires that a contractor not serve as the public insurance adjuster for a project that he is working on as a contractor. *Id.* § 4102.163(a).

First Amendment jurisprudence has never prevented a State from making conduct illegal just because that conduct involves or is carried out by speaking. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006)). It is no more unconstitutional to criminalize the act of soliciting someone to commit a crime (clearly a burden on speech) than it is to restrict who may practice a profession (often a burden on speech) or to restrict a professional from engaging in conflicts of interest (sometimes a burden on speech).

Consequently, the court of appeals erred in concluding that the First Amendment is implicated merely because "[t]he business of public insurance adjusting necessarily and inextricably involves speech." *Stonewater*, 641 S.W.3d at 802. That is true of the practice of law, medicine, and countless other professions that may be regulated without inviting First Amendment scrutiny.

B. *NIFLA* does not control this case.

Stonewater relies on its erroneous reading of *NIFLA* in its attempt to refute the conclusion above. But properly understood, *NIFLA* demands the same result.

In *NIFLA*, the Supreme Court overturned the special treatment some circuits had given "professional speech." 138 S. Ct. at 2371-72. There, the Court explained that "speech is not unprotected merely because it is uttered by professionals." *Id.* Therefore, those circuits had erred by not applying ordinary First Amendment

scrutiny to *content-based restrictions on speech* by professionals. *Id.* But two "line[s] of precedent[] [were not] implicated" in *NIFLA*. *Id.* at 2372. First, deferential review is appropriate for "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* And second, "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* The second line of precedent—represented by the cases cited above and left undisturbed by *NIFLA*—remains controlling here.

The Fifth Circuit has correctly explained *NIFLA*'s holding in relation to that precedent. *See Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020). At bottom, although the Supreme Court disavowed the "professional speech" rule and refused to "recogniz[e] a new category of unprotected speech, the Court adhered to the traditional conduct-versus-speech dichotomy." *Id.* at 932. So, it remains the case that regulations of conduct or commerce are permissible even though they incidentally burden speech, and that professional conduct and commerce are no exception. *Id.* (citing *NIFLA*, 138 S. Ct. at 2370-76). Indeed, *NIFLA* cited *Ohralik*, *Sorrell*, and *Giboney*, for the very propositions they support above. 138 S. Ct. at 2373.

NIFLA itself is instructive on what is conduct and what is speech, and it supports dismissal of Stonewater's petition. There, California enacted a law requiring licensed "crisis pregnancy centers"—organizations usually associated with the pro-life movement—to provide a government-drafted notice on site. *Id.* at 2368-69. The notice communicated that California provides public assistance programs covering "family planning," "prenatal care," and "abortion for eligible women." *Id.* at 2369.

And it had to be either posted in the waiting room or provided directly to "all clients," *id.*—quintessential compelled-speech.

The Court concluded, under the traditional taxonomy, that the law did not regulate conduct and, instead, regulated speech as speech. To make that distinction, the Court contrasted the law before it with the informed-consent requirement at issue in *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022). There, physicians were required to provide abortion patients with certain information related to the procedure, such as a description of the risks involved. *NIFLA*, 138 S. Ct. at 2373. The *Casey* opinion explained that an informed-consent requirement for any procedure is a valid regulation of the "practice of medicine" as conduct, and that it only burdened speech incidentally. *Id.* The requirement in *NIFLA*, on the other hand, was not an informed-consent requirement, nor did it have anything to do with regulating a particular procedure or professional act. *Id.* It instead "regulate[d] speech as speech." *Id.* at 2374.

As discussed above, the license requirement in this case regulates who may act as a public insurance adjuster. Put another way, just like an informed-consent requirement, section 4201.051(a) regulates whether and when a person may perform a specific professional act. It demands that an act (the provision of public insurance adjusting services) be done only after obtaining a license. An informed-consent requirement similarly demands that a professional act (a medical procedure) be done

only if the physician has provided the patient with information relevant to the procedure. Both burden speech only incidentally to the regulation of conduct.

The same is true of the conflict-of-interest prohibition. It restricts how a professional act (i.e., the provision of public insurance adjusting services) may be performed. It demands that act not be undertaken concurrently with another act—the provision of contracting services for the same property. And it regulates the conduct itself and only burdens speech incidentally. Neither statute is subject to First Amendment scrutiny.

II. Stonewater's Vagueness Challenges Necessarily Fail.

Stonewater brought both as-applied and facial challenges based on the supposed vagueness of sections 4102.051(a) and .163. TDI should prevail for two reasons. First, contrary to the court of appeals' conclusion, TDI did move to dismiss the facial challenge and gave extensive argument in the trial court why it should prevail. And second, both the as-applied and facial challenges are barred because Stonewater's own conduct is clearly proscribed.

A. TDI moved to dismiss both the as-applied and facial challenges and preserved its arguments as to both.

The court of appeals confused whether TDI had moved to dismiss Stonewater's facial challenge. According to the court of appeals, TDI acknowledged the facial challenge but "failed to fully develop its argument on this point." *Stonewater*, 641 S.W.3d at 805. Therefore, the court concluded it "c[ould] not say the trial court necessarily considered Stonewater's facial vagueness claim," and thus, it "f[ound]

Stonewater ha[d] sufficiently pleaded the claim." *Id.* The court's analysis disregards the extensive argument TDI made in the trial court.

TDI explained to the trial court, just as TDI explains below, that a plaintiff may not assert *either* a facial challenge or an as-applied challenge when its own conduct is clearly proscribed. CR.61. TDI also explained why Stonewater's conduct, as described in the petition, is clearly proscribed. CR.61-62. And TDI concluded its argument by saying that "[g]iven this description of Stonewater's conduct, as stated in its petition, this Court need not reach any potential hypothetically vague applications of the statutes as applied to other parties." CR.62-63.

How this argument could have been insufficient to put the central flaw of Stonewater's facial challenge before the trial court is unclear. *Cf.* Tex. R. Civ. P. 33.1(a) & 91a.2. Moreover, Stonewater responded at length specifically to TDI's argument against the facial challenge. CR.88-90. And TDI re-urged its argument in reply. CR.99-101. The court of appeals therefore erroneously failed to address TDI's properly preserved and presented arguments.

B. Stonewater is barred from bringing any species of vagueness claim.

1. When a plaintiff's own conduct is clearly proscribed, he may not bring either a facial or an as-applied challenge.

In the lower courts, Stonewater argued that it did not need to show the statutes were vague as to its own conduct in order to bring a facial challenge. That was wrong for several reasons.

To begin, Stonewater's reliance on *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), is misplaced. That case did not involve a due-process vagueness challenge, as Stonewater asserts here, but rather a First Amendment overbreadth challenge. *Id.* at 129. True, in an overbreadth challenge, a regulation "may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Id.* But vagueness cases, both before and since *Forsyth County*, have drawn a distinction and applied a different rule.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., involved a facial challenge as to both overbreadth and vagueness. 455 U.S. 489 (1982). The Supreme Court explained there that a facial vagueness challenge survives "only if the enactment is impermissibly vague in all of its applications." *Id.* at 495. Indeed, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* And an examination of the plaintiff's own conduct should come before "other hypothetical applications of the law." *Id.*

In the trial court, Stonewater protested that the law at issue in *Hoffman* did not burden speech, and it claimed that *Hoffman*'s rule applies only to cases that similarly do not implicate the First Amendment's speech guarantee. CR.88-89. But it abandoned that argument on appeal, as later precedent directly refutes it. And, in any event, the laws at issue here do *not* implicate the First Amendment's speech guarantee. *See* Part I, *supra*.

In 2010, the Supreme Court spoke again to clarify these matters—and did so definitively—in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 20 (2010). Although *Holder* involved only an as-applied vagueness challenge, *id.* at 14, the Ninth Circuit had evaluated the law as to "facts not before it" and considered hypothetical scenarios. *Id.* at 19. Thus, it violated *Hoffman*'s rule. *Id.* at 20. The Supreme Court clarified that the "rule makes no exception for conduct in the form of speech." *Id.* Thus, "even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim . . . . [a]nd he certainly cannot do so based on the speech of others." *Id.* That should definitively end Stonewater's arguments to the contrary.

2. At least some of Stonewater's conduct is clearly proscribed.

Any vagueness challenge is barred as long as *some* of the plaintiff's conduct is clearly proscribed. *Hoffman*, 455 U.S. at 495; *Holder*, 561 U.S. at 20; *Expressions*, 137 S. Ct. at 1151-52. Here, at least some of Stonewater's conduct is clearly proscribed.

Stonewater alleges that it "regularly communicates directly with the customer's insurer to identify and explain the relevant damage, inquire about claim status, revision, and supplementation, and answer any questions from the insurer regarding, among other things, the scope of the necessary work, the estimated costs, and the recommended methods of repair." CR.5-6. And Stonewater purportedly has "developed a system which helps [its] customers settle their insurance claims as quickly, painlessly and comprehensively as possible." CR.6. Finally, and most obviously proscribed, Stonewater's contracts with customers authorize it "to negotiate on [the

customer's] behalf with [the] insurance company and upon insurance approval to do the work specified." CR.7 (alterations in original).

Public insurance adjusting means taking "acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property." Tex. Ins. Code § 4102.001(3)(A)(i). It is indisputable that Stonewater advertises, contracts for, and actually does provide services that fall within that definition. So, Stonewater's own petition shows that it engages in the unlicensed practice of public insurance adjusting and holds itself out to be a public insurance adjuster in violation of section 4102.051(a). Moreover, by "negotiat[ing] on [the customer's] behalf" and then "do[ing] the work specified" on the same property, CR.7 (second alteration in original), it clearly violates section 4102.163(a)'s conflict-of-interest prohibition. Stonewater's vagueness challenges, whether facial or as-applied, and whether sounding in unfair notice or arbitrary enforcement, fail. The court of appeals' overly rigid analysis leading to the contrary conclusion, *Stonewater*, 641 S.W.3d at 805, is erroneous.

III. This Case Presents Important Issues, and the Erroneous Opinion Could Have Sweeping Impacts on Texas Law if Left Undisturbed.

The court of appeals' opinion may have significant spillover effect into other professions, spawning copycat litigation and potential impairment of the State's authority to protect public health and safety. Unless this Court grants review, prohibitions on the unlicensed practice of law, medicine, accounting, and many other

professions, as well as other conduct-based restrictions on the practice of those professions, will be subject to undue attack.

If the court of appeals is correct, the State could not, for example, prohibit the unlicensed provision of legal advice without surviving strict scrutiny. After all, one must speak to provide legal advice. Although the State's compelling interest in that and other similar prohibitions might prevail, it would subject the State to voluminous, burdensome, unnecessary litigation to defend its regulations against claims that they are not sufficiently narrowly tailored or effective enough to be justified. Where, as here, regulations govern conduct, their narrowness and effectiveness are matters necessarily left to legislative judgment. The Court should grant the petition in this case to preserve the proper scope of First Amendment review and the proper balance of power among the branches of government.

Prayer

The Court should grant the petition, reverse the court of appeals' judgment denying Rule 91a relief, and render judgment dismissing Stonewater's petition in its entirety.

Respectfully submitted.

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No. 22-0427

In the Supreme Court of Texas

TEXAS DEPARTMENT OF INSURANCE AND CASSIE BROWN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE,

Petitioners,

v.

STONEWATER ROOFING, LTD. CO.,

Respondents.

On Petition for Review
from the Seventh Court of Appeals, Amarillo

APPENDIX

Tab

Tab A
Trial Court Judgment

CAUSE NO. D-1-GN-20-003172

STONEWATER ROOFING, LTD. CO., *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	
	§	TRAVIS COUNTY, TEXAS
TEXAS DEPARTMENT OF INSURANCE; and KENT SULLIVAN in his official capacity as COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE, *Defendants.*	§	201ST JUDICIAL DISTRICT

ORDER GRANTING MOTION TO DISMISS

The Court has considered the Motion to Dismiss filed by Defendants, Texas Department of Insurance and Kent Sullivan in his official capacity as Commissioner of the Texas Department of Insurance. The Court, having considered the Motion, response, reply, and arguments of counsel, has determined that the motion should be, and it is, GRANTED.

IT IS THEREFORE ORDERED that Defendants Texas Department of Insurance and Kent Sullivan in his official capacity as Commissioner of the Texas Department of Insurance's Motion to Dismiss is GRANTED. Plaintiff Stonewater Roofing, LTD. Co.'s claims for relief against Defendants are hereby DISMISSED.

IT IS FURTHER ORDERED that all other relief not granted herein is in all things denied.

IT IS FURTHER ORDERED that this is a final judgment that disposes of all parties and all claims and is appealable.

Signed this 10th day of December, 2020.

Honorable Lora J. Livingston
Judge Presiding

APPROVED AS TO FORM:

/s/ Michael A. McCabe (w/ permission)

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Tab B
Court of Appeals Opinion

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00016-CV

STONEWATER ROOFING, LTD. CO., APPELLANT

V.

TEXAS DEPARTMENT OF INSURANCE AND KENT SULLIVAN
IN HIS OFFICIAL CAPACITY AS COMMISSIONER
OF THE TEXAS DEPARTMENT OF INSURANCE, APPELLEES

On Appeal from the 201st District Court
Travis County, Texas
Trial Court No. D-1-GN-20-003172; Honorable Lora J. Livingston, Presiding

February 2, 2022

OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

Appellant, Stonewater Roofing, Ltd. Co., appeals from the trial court's *Order Granting Motion to Dismiss,* entered pursuant to Rule 91a of the Texas Rules of Civil Procedure, in favor of Appellees, Texas Department of Insurance and Kent Sullivan, in his official capacity as Commissioner of the Texas Department of Insurance (hereinafter

collectively "TDI"). By two issues, Stonewater contends the trial court erred in granting TDI's motion to dismiss because its pleadings demonstrated an adequate basis in law and in fact, under the appropriate Rule 91a standard, to support its causes of action under the First and Fourteenth Amendments to the United States Constitution. *See* TEX. R. CIV. P. 91a.[1] (providing for the dismissal of any cause of action that does not have a "basis in law or fact"). Based on the facts of this case, we will reverse the order of the trial court and remand the matter for further proceedings not inconsistent with this ruling. TEX. R. APP. P. 43.2(d).[2]

BACKGROUND

In 2005, the Texas Legislature enacted provisions under the insurance code regulating "public insurance adjusting."[3] Public insurance adjusters are frequently hired by an insured to help resolve and settle insurance claims. The enacted provisions provide that a public insurance adjuster must be licensed in order to adjust insurance claims on an insured's behalf. TEX. INS. CODE ANN. § 4102.051 (West Supp. 2021).[4] Under these provisions, any person or entity defined as a contractor is prohibited from adjusting

[1] Rule 91a is analogous to Federal Rule of Civil Procedure 12(b)(6) and thus, case law interpreting Rule 12(b)(6) is helpful in our analysis herein.

[2] Originally appealed to the Third Court of Appeals, sitting in Austin, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Third Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

[3] The Texas Legislature enacted chapter 4102 of the Texas Insurance Code effective September 1, 2005. *See* Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 11.082(a), 2005 Tex. Gen. Laws 2259, 2259-72 (codified at TEX. INS. CODE ANN. §§ 4102.001-.208). Chapter 4102 is a comprehensive licensing statute regulating public insurance adjusters. *See* TEX. INS. CODE ANN. §§ 4102.001-.208 (West 2009 & Supp. 2021).

[4] This provision is simply a licensing requirement. The parties have little dispute regarding this provision.

insurance claims for properties at which the contractor is, or will be, providing contracting services. TEX. INS. CODE ANN. § 4102.163 (West 2009). Likewise, licensed public insurance adjusters are prohibited from providing any contracting services on property at which they are, or will be, providing public insurance adjusting services. In other words, acting as a public insurance adjuster and a contractor on the same claim is a statutorily defined conflict of interest. TEX. INS. CODE ANN. § 4102.158(a)(1) (West 2009).

Stonewater is a professional roofing company that repairs and replaces commercial and residential roofs in Texas. Stonewater is not licensed as a public insurance adjuster. However, Stonewater's website purportedly includes statements such as it is "highly experienced with the insurance claims process," that it has "done thousands of roof restorations due to insurance claims over the years," and it "understand[s] the supplement process required." Stonewater's website has also allegedly referenced the company as a "Trusted Roofing and Insurance Specialist" and "The Leader In Insurance Claim Approval," having "developed a system which helps our customers settle their insurance claims as quickly, painlessly and comprehensively as possible." Some of Stonewater's prior form agreements ostensibly contained language that "authorized" Stonewater "to negotiate on [the customer's] behalf with [the] insurance company and upon insurance approval to do the work specified." One of Stonewater's customers sued it, arguing these statements violated the prohibitions set forth in chapter 4102 of the Insurance Code.

In June 2020, Stonewater filed suit against TDI, challenging the prohibitions as impermissible regulations of commercial speech and alleging the provisions were

unconstitutionally vague.[5] Stonewater requested a declaration that the prohibitions are invalid on their face and as applied under the First and Fourteenth Amendments to the United State Constitution and "corresponding provisions" of the Texas Constitution. TDI filed a general denial on July 17, 2020, and a Rule 91a motion to dismiss on August 21, 2020. TDI argued that Stonewater's constitutional challenges were subject to dismissal because they had no basis in law. The trial court held a hearing on the motion and without explanation as to the basis for its ruling, granted TDI's motion to dismiss.

STANDARD OF REVIEW

Rule 91a provides a procedure for dismissal of a case that has no basis in law or no basis in fact. TEX. R. CIV. P. 91a. A court of appeals reviews the merits of a Rule 91a motion "*de novo* because the availability of a remedy under the facts alleged is a question of law and the rule's factual plausibility standard is akin to a legal-sufficiency review." *Antolik v. Antolik*, No. 07-20-00281-CV, 2021 Tex. App. LEXIS 7272, at *6 (Tex. App.—Amarillo Aug. 31, 2021, no pet.) (mem. op.) (citing *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016)).

"A cause of action has no basis in law if the allegations, taken as true, together with reasonable inferences drawn from them, do not entitle the claimant to the relief sought." *Antolik*, 2021 Tex. App. LEXIS 7272, at *6-7 (citation omitted). Except as required by 91a.7 (award of costs and attorney fees), the court "may not consider

[5] We note that Stonewater properly filed notice with the attorney general's office that it was challenging the statute as unconstitutional. TEX. GOV'T CODE ANN. § 402.010 (requiring party to notify attorney general when raising constitutional challenge to statute); TEX. CONST. art. V, § 32 (permitting legislature to require court to provide notice to attorney general of constitutional challenge).

evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action . . . ." *Id.* (citing TEX. R. CIV. P. 91a.6).

Furthermore, the trial court construes the pleadings liberally in favor of the plaintiff, looks to the plaintiff's intent, and accepts the plaintiff's factual allegations as true, and, if necessary, draws reasonable inferences from the factual allegations to determine if the cause of action has a basis in both law and fact. *Antolik*, 2021 Tex. App. LEXIS 7272, at *7 (citing *In re Farmers Tex. Cty. Mut. Ins. Co.*, 604 S.W.3d 421, 425-26 (Tex. App.—San Antonio 2019, orig. proceeding)). Dismissal of a cause of action under Rule 91a is a harsh remedy with fee-shifting consequences; thus, an appellate court strictly construes the rule's requirements. *Antolik*, 2021 Tex. App. LEXIS 7272, at *7 (citing *Bedford Internet Office Space, LLC v. Tex. Ins. Grp., Inc.*, 537 S.W.3d 717, 720-21 (Tex. App.—Fort Worth 2017, pet. dism'd)).

The trial court may not consider evidence in ruling on the dismissal motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by the Texas Rules of Civil Procedure. *Antolik*, 2021 Tex. App. LEXIS 7272, at *7-8 (citing TEX. R. CIV. P. 91a.6.5; *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703, 706 (Tex. 2018); *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018); *Sanchez*, 494 S.W.3d at 724). In deciding whether the trial court properly granted a motion to dismiss under Rule 91a, a reviewing court applies the fair-notice pleading standard in determining whether the allegations in the petition were sufficient to allege a cause of action. *Antolik*, 2021 Tex. App. LEXIS 7272, at *8 (citing *Thomas v. 462 Thomas Family Props., LP*, 559 S.W.3d 634, 639-40 (Tex. App.—Dallas 2018, pet. denied)). Under that standard, a court considers whether the opposing

party "can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Antolik*, 2021 Tex. App. LEXIS 7272, at *8 (citing *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000)). In other words, the fair-notice standard measures whether the pleading has provided the opposing party sufficient information to enable that party to prepare a defense or a response. *Antolik*, 2021 Tex. App. LEXIS 7272, at *8 (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224-25 (Tex. 2017) (citing *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013); *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)).

ISSUES

Through two issues, Stonewater contends it sufficiently pleaded both a factual and a legal basis for its claim under the First and Fourteenth Amendments, for which TDI failed to identify any clear bar. Accordingly, it argues, the trial court's judgment of dismissal must be reversed.

ISSUE ONE—FIRST AMENDMENT CLAIM

Via its first issue, Stonewater argues the trial court erred as a matter of law in granting TDI's motion to dismiss its First Amendment claim. Stonewater argues its claim survives a Rule 91a motion to dismiss because the prohibitions in question restrict a broad range of commercial speech and facially regulate that speech on the basis of both its content and its speaker. As such, Stonewater contends the statutory prohibitions violate the First Amendment on its face. Stonewater further claims the statutory provisions amount to a content-based restraint of free speech, are presumptively unconstitutional, and fail to pass a strict scrutiny review. Alternatively, Stonewater asserts that the statutory

provisions in question amount to an improper regulation of commercial speech and that they also fail intermediate scrutiny. TDI argues the trial court properly dismissed Stonewater's First Amendment challenge to the prohibitions because the statutes do not trigger First Amendment scrutiny at all. As support for its argument, TDI contends the "First Amendment only applies to governmental regulations of speech, and the Public Adjusting Prohibitions do not regulate speech but instead regulate unprotected professional conduct." TDI asserts the prohibitions do not require anything specific to be said, printed, or disseminated and do not prohibit general discussions of topics that are legal. As such, TDI contends, the provisions do not target speech as speech. Rather, the provisions regulate professional conduct by prohibiting the unlicensed practice of public insurance adjusting and prohibiting contractors from adjusting claims for certain properties. For the reasons stated hereinbelow, we disagree with TDI's position and agree with Stonewater's position.

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. CONST. amend I. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). If a law simply prohibits non-expressive conduct rather than speech, the First Amendment is inapplicable, and the inquiry proceeds no further. *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020). (citation omitted). Thus, we must first determine whether the prohibitions at issue here (1) regulate only speech, (2) restrict speech only incidentally to their regulation of non-expressive professional conduct, or (3) regulate only non-expressive conduct. *Id.* (citation omitted). The United States Supreme Court spoke to these issues as it applied to occupational licensing regulations in *Nat'l Inst. of Family*

& Life Advocates v. Becerra, 2018 U.S. LEXIS 4025, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018). There, the Court explained that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371-72. A professional speech exception to the right of free speech, it warned, would "give the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. Such power would give the States a powerful tool to impose "invidious discrimination of disfavored subjects." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424, n.19, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)). Accordingly, the Court applied "the traditional conduct-versus-speech dichotomy" used in other cases.[6]

Under the First Amendment, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 576 U.S. at 163 (citing *Police Dep't of Chicago v. Mosley*, 408 U. S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citing *R.A.V. v. St. Paul*, 505 U. S. 377, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)).

Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *Reed*, 576 U.S. at 163 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 263-565, 131 S. Ct. 2653,

[6] TDI notes that it is not arguing that the "professional speech" doctrine applies here, as Stonewater contends. TDI acknowledges that doctrine "is dead." Rather, TDI's argument is "squarely within the confines of the conduct-versus-speech dichotomy."

2663-64, 180 L. Ed. 2d 544, 555-56 (2011); *Carey v. Brown*, 447 U. S. 455, 462, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *Mosley*, 408 U.S. at 95). This "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (citing *Sorrell*, 564 U.S. at 564). Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, while others are more subtle, defining regulated speech by its function or purpose. Both are "distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 576 U.S. at 164.

We must address TDI's argument that this case involves conduct, not speech. It contends the challenged statutes regulate professional conduct because the provisions do not prohibit Stonewater from engaging in communications related to insurance but rather simply prohibit Stonewater from receiving compensation for acting on behalf of an insured party and adjusting claims without a public insurance adjuster license. Accordingly, it asserts, the protections of the First Amendment are inapplicable and an intermediate rational basis scrutiny should apply because the provisions are rationally related to a legitimate government purpose, i.e., regulating the practice of insurance adjusting.

Section 4102.163(a) provides: "A contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services, regardless of whether the contractor: (1) holds a [public insurance adjuster] license under this chapter; or (2) is authorized to act on behalf of the insured under a power of attorney or other agreement." TEX. INS. CODE ANN. §

4102.163(a). While, in this instance, TDI maintains the statute speaks only to conduct, we find any conduct under the statute consists of communicating.[7] TDI points to nothing that a public insurance adjuster does that is simply conduct. The business of public insurance adjusting necessarily and inextricably involves speech. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010). *See also Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (If "the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct."). Courts have long held that dissemination of information is speech within the First Amendment. *Sorrell*, 564 U.S. at 570. Here, Stonewater's statements and discussions consisted of communicating and of gathering and disseminating information. Accordingly, this case involves speech, not conduct.

We must turn then to a determination of whether the speech in question is content-based. Under chapter 4102, the permissibility of a contractor's communications is dependent on whether the contractor communicates with the function or purpose of "negotiating for or effecting the settlement of a claim" or "advertis[ing]" or "solicit[ing]" the ability to do so. However, chapter 4102 does not prohibit the contractor from making other types of statements on behalf of the insured such as estimating the amount of damage to a customer's home or the appropriate replacement cost. As such, it is necessary to examine the content of a given statement to determine whether it is prohibited under chapter 4102. Stonewater argues that because the prohibitions do "not simply have an effect on speech, but [are] directed at certain content and aimed at

[7] The same assertion is made in the *Amici Curiae* brief.

particular speakers," they cannot satisfy strict scrutiny. *See Barr v. Am. Ass'n of Political Consultants*, 2020 U.S. LEXIS 3544, 140 S. Ct. 2335, 2342, 207 L. Ed. 2d 784 (2020). *See also Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2365-66. TDI concedes through its arguments that the prohibitions "do not prohibit general discussions of topics that are legal" and thus, appears to acknowledge that the legality of Stonewater's statements is dependent on the topics discussed.

The situation before us is similar to that at issue in *Sorrell*, 564 U.S. at 563. There, the statute prohibited pharmaceutical companies from selling, disclosing, or using prescriber-identifying information for marketing but not for other purposes such as "educational communications." *Id.* at 563-64. The court found that on its face, the statute enacted content-and-speaker-based restrictions and thus, the statute was subject to heightened scrutiny. *Id.* at 565. The court further found that the law did "not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id.* at 567. Likewise, we find the prohibitions here are both content-based, as the prohibition is dependent on the content of the communications, and speaker-based, because it is aimed specifically at roofing contractors, the speakers. Thus, the provisions are subject to strict scrutiny under the First Amendment. As such, the State would be required to present evidence to show that the prohibited communication had a direct causal relationship to the State's compelling interest. Accordingly, we find Stonewater sufficiently pleaded a legal and factual basis for its First Amendment claim such that the trial court erred in granting TDI's Rule 91a motion to dismiss.

Moreover, we agree with Stonewater that even if these prohibitions restrict speech only incidentally in the regulation of non-expressive professional conduct, the less

stringent standard under the First Amendment applies. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (seminal case finding that the First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation; sets forth a four-part analysis applying an intermediate level of scrutiny). As such, outright dismissal of Stonewater's claim would still be improper under this standard of review. *See McLemore v. Gumucio*, No. 3:19-CV-00530, 2020 U.S. Dist. LEXIS 228082, at *48, 57 (M.D. Tenn. Dec. 4, 2020) (finding that advertising as and representing to be an auctioneer implicates speech, even if the regulation of speech is only incidental to a regulation of conduct (i.e., a sales transaction) and stating "even a neutral regulation unrelated to the content of expression that incidentally burdens speech is still subject to an intermediate form of scrutiny" and "intermediate scrutiny (like strict scrutiny) would require the court to make factual findings based on evidence, which cannot be done at the motion to dismiss stage"). *See also Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1149 (D.N.D. 2019); *Capital Associated Indus. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) (both applying intermediate scrutiny).

Accordingly, we find Stonewater's pleadings include factual allegations that satisfy the requisites of bringing a First Amendment claim. It is not for us to determine whether such allegations will ultimately be meritorious as our only inquiry here is whether Stonewater has sufficiently pleaded its claim to survive a Rule 91a motion to dismiss. We find it has and sustain Stonewater's first issue.[8]

[8] Stonewater also argues TDI failed to address its as-applied challenge. Given our disposition herein, we find it unnecessary to address that complaint.

ISSUE TWO—FOURTEENTH AMENDMENT CLAIM

By its second issue, Stonewater argues the trial court erred as a matter of law in granting TDI's motion to dismiss the Fourteenth Amendment claim because it failed to assert an argument that supported a dismissal of the claim. First, Stonewater argues, the prohibitions do not clearly proscribe Stonewater's speech. Further, TDI argued only that Stonewater could not sustain a vagueness challenge as applied to Stonewater if the prohibitions clearly proscribed Stonewater's alleged speech. However, that argument, Stonewater asserts, has no bearing on whether it can maintain its facial vagueness challenge because facial attacks are not dependent on the facts surrounding any particular decision.[9]

TDI responds that the trial court properly dismissed Stonewater's Fourteenth Amendment claim because Stonewater's conduct was clearly proscribed, foreclosing a vagueness challenge. TDI argues that Stonewater failed to acknowledge that a void-for-vagueness challenge fails if the complainant's own conduct is clearly proscribed by the law.

The Fourteenth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. The "[v]agueness doctrine is an outgrowth of the Due Process Clause." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Due process

[9] An as-applied challenge asserts that a statute is unconstitutional as applied to the challenger's particular conduct. *Columbus v. Meyer*, 786 N.E.2d 521, 526 (10th Dist. Ohio 2003). In contrast, a facial-vagueness challenge asserts the statute is vague in all of its applications. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). A facial-vagueness challenge asserts that a law is unconstitutional as applied to the hypothetical conduct of a third party and without regard to the challenger's specific conduct. *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 129, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992).

requires that statutes providing for criminal prosecution be drafted "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). *See also Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 2557-58, 192 L. Ed. 2d 569 (2015); *Munn v. City of Ocean Springs, Miss.*, 763 F.3d 437, 439 (5th Cir. 2014) ("The Due Process Clause requires that a law provide sufficient guidance such that a man of ordinary intelligence would understand what conduct is being prohibited."). Violation of the prohibitions here subject the violator to civil and criminal penalties.

Where a law infringes on fundamental rights, particularly First Amendment rights, courts permit standalone facial vagueness challenges. *Sibley v. Watches*, 501 F. Supp. 3d 210, 226-27 (W.D.N.Y. 2020) (citations omitted). To prevail on a facial vagueness challenge of a law that implicates fundamental rights, the challenger must show that the law "reaches a substantial amount of constitutionally protected conduct." *Id.* (citations omitted). In other words, the law will not be facially invalidated unless its chilling effect on constitutionally protected conduct is "both real and substantial." *Id.* (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)). "Thus, all vagueness challenges—whether facial or as-applied—require [courts] to answer two

separate questions: whether the statute gives adequate notice, and whether it creates a threat of arbitrary enforcement." *Sibley*, 501 F. Supp.3d at 227.

Stonewater argued that the prohibitions are void for vagueness because the provisions do not provide fair notice of the conduct that might be punished. Consequently, it and other similarly situated roofing companies cannot definitively know what statements might trigger a violation because the language of the statute is sufficiently broad to encompass any of the routine statements made by such companies to insureds. Stonewater argues TDI totally failed to challenge this claim and thus, the trial court erred in dismissing the claim under Rule 91a. TDI disagrees, arguing it did challenge the facial vagueness claim and that the trial court dismissed it as part of its consideration of Stonewater's as-applied challenge. The pleadings show TDI acknowledged Stonewater's facial vagueness claim in its Rule 91a motion to dismiss. However, it said only that "Stonewater fails to show at the outset that the statute is vague as applied to its own actions, thereby eliminating any need for this court to ponder any hypothetical applications as to other conceivable parties." Because TDI failed to fully develop its argument on this point and because we cannot say the trial court necessarily considered Stonewater's facial vagueness claim as part of the as-applied claim, we find Stonewater has sufficiently pleaded the claim so as to survive the Rule 91a motion to dismiss.

Speech is not clearly proscribed if the plaintiff "had reason to suppose that his particular statements . . . would not violate the challenged law." *Holder*, 561 U.S. at 23. TDI argues the prohibitions clearly proscribe these statements by Stonewater:

> (1) Stonewater's website stating that the company consists of "Trusted Roofing and Insurance Specialists" and is the [sic] "The Leader in

> Insurance Claim Approval" that "developed a system which helps our customers settle their insurance claims as quickly, painlessly and comprehensively as possible[,]" and (2) Stonewater's use of a form agreement that "authorized Stonewater to negotiate on the customer's behalf with the insurance company and upon insurance approval to do the work specified."

The provisions prohibit advertising or soliciting oneself as an adjuster of claims and acts on behalf of an insured in negotiating for or effecting the settlement of a claim. The statements made by Stonewater set forth above do none of those things. In none of the statements does Stonewater ever say it is a public insurance adjuster or that it is acting as "an adjuster of claims" as barred by section 4102.001(3)(B) of the Insurance Code and, accordingly, Stonewater had no reason to believe that any of the statements it made violated that provision. This is particularly true in the context in which its customers hired both Stonewater and a separate public insurance adjuster. Under those circumstances, Stonewater certainly had no reason to believe any of the statements it made violated the prohibitions. A customer would have no reason to hire a public insurance adjuster separate and apart from Stonewater if it was acting as a public insurance adjuster. Accordingly, Stonewater's statements were not clearly proscribed, and it has sufficiently pleaded its claims under the Fourteenth Amendment sufficient to survive TDI's Rule 91a motion to dismiss. We sustain Stonewater's second issue.

CONCLUSION

Having sustained each of Stonewater's appellate issues, we reverse the order of the trial court and remand the matter for further proceedings.

Patrick A. Pirtle
Justice

Tab C
Court of Appeals Judgment

No. 07-21-00016-CV

Stonewater Roofing, Ltd. Co. Appellant	§	From the 201st District Court of Travis County
	§	
v.		February 2, 2022
	§	
Texas Department of Insurance and Kent Sullivan, in His Official Capacity as Commissioner of the Texas Department of Insurance Appellees	§	Opinion by Justice Pirtle

J U D G M E N T

Pursuant to the opinion of the Court dated February 2, 2022, it is ordered, adjudged, and decreed that the judgment of the trial court be reversed and this cause is remanded to the trial court.

It is further ordered that appellees pay all costs in this behalf expended for which let execution issue.

It is further ordered that this decision be certified below for observance.

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Tab D
U.S. Const. amend. I

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 117-159. Some statute sections may be more current, see credits for details.

End of Document

Tab E
Tex. Ins. Code § 4102.051

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 13. Regulation of Professionals (Refs & Annos)
Subtitle C. Adjusters
Chapter 4102. Public Insurance Adjusters
Subchapter B. License Requirements

V.T.C.A., Insurance Code § 4102.051

§ 4102.051. License Required; Exemption

Effective: September 1, 2015
Currentness

(a) A person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license issued by the commissioner under Section 4102.053 or 4102.054.

(b) A license is not required for:

(1) an attorney licensed to practice law in this state who has complied with Section 4102.053(a)(6); or

(2) a person licensed as a general property and casualty agent or personal lines property and casualty agent under Chapter 4051 while acting for an insured concerning a loss under a policy issued by that agent.

Credits
Added by Acts 2005, 79th Leg., ch. 728, § 11.082(a), eff. Sept. 1, 2005. Amended by Acts 2007, 80th Leg., ch. 548, § 2.31, eff. Sept. 1, 2007; Acts 2015, 84th Leg., ch. 1178 (S.B. 1060), § 1, eff. Sept. 1, 2015.

V. T. C. A., Insurance Code § 4102.051, TX INS § 4102.051
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab F
Tex. Ins. Code § 4102.163

V.T.C.A., Insurance Code § 4102.163

§ 4102.163. Certain Contractor Business Prohibited

Effective: September 1, 2019

Currentness

(a) A contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services, regardless of whether the contractor:

(1) holds a license under this chapter; or

(2) is authorized to act on behalf of the insured under a power of attorney or other agreement.

(b) The commissioner shall adopt rules necessary to implement and enforce this section.

Credits

Added by Acts 2013, 83rd Leg., ch. 903 (H.B. 1183), § 2, eff. Sept. 1, 2013. Amended by Acts 2019, 86th Leg., ch. 1100 (H.B. 2103), §§ 1, 2, eff. Sept. 1, 2019.

V. T. C. A., Insurance Code § 4102.163, TX INS § 4102.163
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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